No. 78-1366

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN J. COSTELLO AND FLOYD E. STEVENS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 587 F. 2d 424. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1978. A petition for rehearing was denied on December 7, 1978 (Pet. App. C). The petition for a writ of certiorari was filed on March 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the amended method of computing retired pay of members of the armed forces deprives retired personnel of contractual rights, or of property in violation of the Fifth Amendment.

STATEMENT

When petitioners retired from the armed services and began receiving retired pay, the amount due them was calculated by the "recomputation" system. Each installment of their retired pay was set at a fixed percentage of the pay then accorded personnel on active duty who held the same rank. Thus, retired pay increased or decreased whenever Congress increased or decreased active duty pay (Pet. App. A-1 to A-2; see also 10 U.S.C. (1958 ed.) 1401 n.1).

In 1963, after petitioners retired, Congress eliminated the recomputation method and substituted a system under which increases are tied to the Consumer Price Index. Uniformed Services Pay Act of 1963, Pub. L. No. 88-132, 77 Stat. 210. See 10 U.S.C. 1401a. More than ten years later petitioners filed this suit in the United States District Court for the Northern District of California under the Tucker Act, 28 U.S.C. 1346(a)(2), challenging the use of the cost-of-living index formula and seeking to recover the difference between their actual pay and the amount they claimed was due them under the old formula.

The district court dismissed the complaints for failure to state a claim (Pet. App. B-1 to B-9), and the court of appeals affirmed (Pet. App. A-1 to A-7). Both courts rejected petitioners' argument that they had a contractual right to have their retired pay computed under the old law (Pet. App. A-2 to A-3, B-6 to B-7). They further held that petitioners had no vested right in a particular method of computing retired pay, of which they had been deprived in violation of the Fifth Amendment. Rather, retired pay continues to be

earned during retirement, as compensation for remaining subject to call to active duty, and, like any other military pay, it can be prospectively altered by Congress (Pet. App. A-4 to A-7, B-7 to B-9).

ARGUMENT

Petitioners maintain that the 1963 amendments, which eliminated the recomputation method of determining retirement pay, violated their contract rights (Pet. 2, 13-14) and deprived them of vested property interests in violation of the Fifth Amendment (Pet. 7-11, 15-17). There is no conflict among the circuits on these matters and no reason to grant review.

As to petitioners' contract claim, this Court reiterated in *United States* v. *Larionoff*, 431 U.S. 864, 869 (1977), that " '[a] soldier's entitlement to pay is dependent upon statutory right,' *Bell* v. *United States*, 366 U.S. 393, 401 (1961) * * * [A]ccordingly the rights of the affected service members must be determined by reference to the statutes and regulations governing the [compensation], rather than to ordinary contract principles." Petitioners' rights, if any, must be founded on statute, and the sole question is whether the statutes establishing the original recomputation formula gave petitioners a property right in continuing use of that formula.

The court of appeals correctly concluded that the retired pay statute in effect when petitioners retired vested no property right in a particular rate of pay in petitioners. Accord, *Abbott* v. *United States*, 200 Ct. Cl. 384, 389-390, cert. denied, 414 U.S. 1024 (1973). It has long been established that retired pay for military personnel is compensation for present services, because

military personnel who have retired from active service must nonetheless stand by for a possible recall to active duty. *United States* v. *Tyler*, 105 U.S. 244 (1881); *Abbott* v. *United States*, *supra*. And because retired pay is compensation for current readiness, Congress is free to reduce compensation for such service "prospectively * * *, even if that reduction deprive[s] members of benefits they had expected to be able to earn." *United States* v. *Larionoff*, *supra*, 431 U.S. at 879.

But even if, as petitioners contend, this approach is "outmoded," and retired pay is at least in part recompence for past services, it does not follow that the method of computing this pay is a vested right. Nothing contained in the statutes in effect at the time of petitioners' retirement promised them that the method of computing their retired pay would not change. Indeed, the written agreement signed by petitioner Stevens, as an enlisted man, indicated that he had only an expectation of " 'the pay or wages due to the ratings which may from time to time be assigned [him] during the continuance of [his] service * * *' " (Pet. App. B-5).

This is in distinct contrast to *Larionoff*, on which petitioners principally rely (Pet. 12-17). The Court there held that Congress intended to commit the armed services to pay a reenlistment bonus as soon as the serviceman agreed to extend his service time in return for the bonus. This Court suggested (431 U.S. at 879), but did not decide, that the agreement in return for a promised bonus might well represent "services already performed," for which the United States must, under the Fifth Amendment, compensate the serviceman.

But petitioners here have shown no similar design. Congress never guaranteed one method of computing retired pay, and it certainly did not do so in return for service members' retirement to inactive status. On the contrary, retired pay for the military, like a number of other federally-funded retirement programs, operates on the "understanding that programs of this nature convey no future rights and so may be changed without taking property in violation of the Fifth Amendment." *Hisquierdo* v. *Hisquierdo*, No. 77-533 (Jan. 22, 1979), slip op. 17; see also *Richardson* v. *Belcher*, 404 U.S. 78, 80 (1971); *Flemming* v. *Nestor*, 363 U.S. 603, 608-611 (1960).*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Petitioners assert (Pet. 6-7, 17-18) that the reasoning of the decision here conflicts with decisions of several state courts defining community property and holding that military retired pay is deferred compensation for past services, not compensation for present services. The state cases are of doubtful authority after *Hisquierdo*, but the status of retired pay as community property need not be decided here.

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